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In The

Supreme Court of the United States

October Term, 1960

No. 745

JOHN P. JENSEN, PETITIONER,

V.

STATE OF NEBRASKA; EX REL. NEBRASKA STATE BAR ASSOCIATION, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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NATURE OF THE CASE

This cause is before this Court on the petition of John P. Jensen for a writ of certiorari to the Supreme Court of Nebraska. This action arose as an original action in the Supreme Court of Nebraska as a disciplinary action against the said John P. Jensen. The Supreme Court of Nebraska found that Jensen's actions in five separate instances violated his duties as an attorney. The petitioner is seeking a writ of certiorari

from this Court on the basis that he was denied due process of law in the State Supreme Court.

STATEMENT OF THE QUESTION INVOLVED

The question at this time is whether this Court should grant or refuse the petition for a writ of certiorari. The position of the respondent is that there is no substantial question of due process involved in this matter.

ARGUMENT

The granting of a writ of certiorari is a matter of grace and writs of certiorari are granted or refused within the sound discretion of this Court. *The Philadelphia and Reading Coal and Iron Co.* v. *Gilbert*, 38 S. Ct. 58, 245 U. S. 162, 62 L. ed. 221, dismiss error. *Gilbert* v. *Philadelphia and Reading Coal and Iron Co.*, 162 N. Y. S. 1121, 176 App. Div. 889; *Wade* v. *Mayo*, 68 S. Ct. 1270, 334 U. S. 672, 92 L. ed. 1647. The petitioner's allegations of a violation of due process go to almost every step of the proceedings in the Nebraska Supreme Court. In general his allegations may be divided into three broad groupings. (1) The preliminary investigation, (2) The allegations of the complaint, and (3) The trial proceedings.

I.

The Preliminary Procedures Before the State Bar Committees Are Merely Investigatory and No Determination of the Rights of Petitioner Were Made. But Were For the Purpose of Determining Whether or Not Formal Charges Should Be Filed.

The petitioner has complained at length of the procedure which was followed before the Committee on

Inquiry and the State Advisory Committee of the Nebraska State Bar Association in this matter. In brief questions 3, 4, 6 and 8 presented by the petitioner as appearing in his petition for certiorari on pages 2, 3 and 4 thereof would appear to fall in this first category. In disciplinary matters in Nebraska there are two separate procedures contemplated. The first is the procedure before the Bar Committees to determine whether or not a formal complaint should be filed. On the filing of a complaint the matter is then prosecuted in the Supreme Court of Nebraska. We have attached as Appendix 1 a copy of a portion of the Rules of the Supreme Court of Nebraska which govern disciplinary proceedings in that Court. It should be noted that Rule 1 provides that proceedings for discipline of attorneys are to be considered civil in their nature and for the purpose of protecting the public and the good name of the members of the Bar. Rule 2 provides that proceedings for the discipline of attorneys may be prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association or on the relation of a private person if leave of court be first obtained. Leave may be granted to a private person under the rule only if the matter has been submitted to a committee of the Nebraska State Bar Association and refused by the State Advisory Committee. Rule 3 sets forth the requirements for a complaint in such an action providing that the grounds thereof be set forth with reasonable definiteness. The rules provide for service of the complaint and provide that the respondent shall have time to answer (Rule 5). Rule 7 provides that when an answer raises an issue of fact that the matter shall be referred to a referee. At the hearing before the referee a full trial is anticipated.

The referee makes his report direct to the Supreme Court on the evidence which has been adduced at the hearing before him. Rule 8 provides for the filing of exception to the report of the referee. Rule 9 contemplates the filing of briefs by the parties to the disciplinary action and argument by the counsel before the Supreme Court.

The petitioner's complaint against the proceedings before the Inquiry Committee and Advisory Committee were directed to qualifications of the members of the Committees and the alleged failure of the Committee on Inquiry and Advisory Committee to follow the procedures set forth in the rules appearing in Appendix 1 on page 46 of his petition. The respondent submits, admitting the truth of the petitioner's allegations of these facts only for the sake of this argument, that the procedures before the Committee on Inquiry and the State Advisory Committee were merely investigative in nature and that respondent's allegations of due process are not applicable to this situation. As pointed out by the Nebraska Supreme Court in its opinion in this matter as appearing in Appendix 4 of the petitioner's petition, pages 96, 99, each state has complete control over the remedy which it offers to suitors in its courts. The Bar Committees are clothed by rules with power to make investigations and to hold hearings in order to determine whether the facts are supported by creditable evidence and whether or not such facts are sufficient to warrant the institution of a proceeding to discipline or disbar an attorney. The preliminary proceedings before the Advisory Committee and the Committee on Inquiry are merely investigating procedures which do not end in any decree nor establish any right This, in effect, is the holding of the

Nebraska Supreme Court in this matter and as to the nature of these committees we submit that this holding is not one that is reviewable by the Supreme Court of the United States. It is submitted that the State Supreme Court's finding in this respect is proper and binding. *Wade* v. *Mayo*, 68 S. Ct. 1270, 334 U. S. 672, 92 L. ed. 1647. The Court of course has pointed out that due process is an illusive concept, that its exact boundaries are undefinable and its content varies according to specific factual contexts. However, this Court has also held that in investigative procedures that some of the guarantees of the Constitution of the United States may be dispensed with without violating due process of law. *Hannah* v. *Larche*, 80 S. Ct. 1502, 363 U. S. 420, 4 L. ed. 2d 1307. *Anonymous Nos. 6 and 7* v. *Baker*, 79 S. Ct. 1157, 360 U. S. 287, 3 L. ed. 2d 1234.

II.

Petitioner's Allegations that the Complaint Did Not State the Ground For the Disciplinary Action and that He Was Disciplined For Charges Not Made Are Not Supported By the Record.

The petitioner further contends in his petition for a writ of certiorari that, in effect, he was suspended from the practice of law on grounds which were never pleaded and on which the attorney had no knowledge or notice until after completion of his hearing before the Court appointed referee. This charge directly attacks the complaint and the pleadings. It is submitted that this argument, advanced by the petitioner herein, is wholly without merit. As pointed out in the opinion of the Court charges must be brought against a respondent before a hearing can be had. The rules of

the Court further provide the nature that these charges shall take. As pointed out earlier Rule 3 of the rules governing disciplinary proceedings provides that the complaint shall set forth the grounds thereof with reasonable definiteness. The complaint in each of the five instances adequately pleaded facts to show the unethical conduct of the petitioner herein. The question of whether the alleged acts were ethical is one for the determination of the Court and the legal effect of the acts need not be pleaded. The State does not accept the petitioner's version of the legal effect of the pleadings in this matter. It is submitted that the complaint and the pleadings clearly set forth the basis of the charges and clearly establish the matters on which this action was based.

III.

Petitioner's Allegations that There Was No Evidence In the Record to Support the Charges of Which He Was Found Guilty; that There Was Fundamental Unfairness In the Use of Evidence and that He Has Been Denied Due Process Are Not Supported By the Record.

The final area in which the petitioner seeks his writ of certiorari is in the proceedings before the referee and the Court. The respondent infers that there is no evidence in the record that he committed the offenses with which he was charged and of which he was found guilty. He also asserts that there was fundamental unfairness in the use of evidence in this matter. With respect to the first argument advanced by the petitioner it seems clear that there is more than sufficient evidence to show the reprehensible conduct on the part of the petitioner in each of the five instances. It may

be that were we to accept the petitioner's version and interpretation of the facts as being correct, that the evidence might be insufficient to support a finding of wrongdoing. However, the evidence in this matter was considered by the referee, his findings reviewed by the Supreme Court of Nebraska and the findings of fact were against the petitioner. There is clearly adequate evidence in the record to support these findings. It is further submitted to the Court that technicalities may not be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong. *In re Becker*, 16 Ill. 2d 488, 158 N. E. 2d 753; *Braverman* v. *Bar Association of Baltimore City*, 209 Md. 328, 121 A. 2d 473. Certiorari denied 352 U. S. 830, 1 L. ed. 2d 51, 77 S. Ct. 44. With reference to the allegations of the petitioner that there was fundamental unfairness in the use of the evidence we wish to point out to the Court that there were no charges made of the State using perjured testimony or that the State coerced a confession from the petitioner herein. It is further submitted that considering the evidence adduced by the petitioner himself in this matter that the charges were sustained and the true character of the actions committed by the petitioner are brought to light. The petitioner's admitted actions are clearly sufficient to subject him to the penalty which he suffered.

However, the petitioner rests his criticism as to the use of evidence toward the admission of a Bill of Exceptions in a matter entitled, *In re Estate of Evans*, (Ex. 2 Supplemental Volume), it might be pointed out to the Court that this case involved the matter of prior testimony wherein the petitioner, John P. Jensen, was a party to the action. This was offered for considera-

tion of the Committee on Inquiry. It might be pointed out to the Court that this evidence as well as the Transcript of Testimony before the Committee on Inquiry (Ex. 5, Supplemental Volume) was offered in evidence before the referee. The petitioner at the hearing before the referee made objections to the admission of both of these documents. However the stipulation appears in the record which the State contends made it proper for such proceedings. This stipulation is included as Appendix 2 hereof. This of course is an evidentiary question. The Supreme Court of Nebraska found that in view of this stipulation and in view of the fact that, as to both the Bill of Exceptions in the *Evans* case and the Transcript of Testimony before the Committee on Inquiry, the petitioner withdrew any objection as to those parts of both of such records that were favorable to him that such were properly received. The Court further found that he had not properly preserved his objections as to the balance of these exhibits. It is difficult to see on what basis the petitioner asserts that due process was violated because of this ruling of the Court.

IV.

The Granting of a Writ of Certiorari Should Be Refused as No Substantial Federal Question Is Involved.

The State contends that no substantial Federal question is involved in this matter. The matter originally started before the Committee on Inquiry and a lengthy hearing was held before this Committee on two different dates. The hearing before the Committee on Inquiry started on July 5, 1957, and was held again on

August 6, 1957, (Ex. 5, Supplemental Volume). The petitioner was personally present and was permitted to examine and cross-examine witnesses. Subsequently the matter was considered by the Advisory Committee of the Nebraska State Bar Association on May 23, 1958, (Ex. 33, Supplemental Volume: introduced into evidence by the petitioner herein, Transcript of Testimony, p. 307). This record shows that the petitioner was advised that this Committee would consider any proper evidence which had been offered and excluded before the Committee on Inquiry. It was determined that a complaint should be filed and on June 16, 1958, a complaint was filed in the Supreme Court of the State of Nebraska.

The petitioner does not contend that he did not receive notice of the complaint. The record is clear that he did. It was also stipulated on December 5, 1958, that the matter be heard by the referee on April 20, 1959, and pursuant to this stipulation the hearing was held commencing on that date. The hearing lasted for five days. The Transcript of Testimony consists of some 780 pages and 78 exhibits. The referee and the Supreme Court of Nebraska found that the facts were against the petitioner. The record clearly shows that the allegations are without merit.

CONCLUSION

In conclusion it is submitted that Nebraska law in disciplinary actions contemplates a complaint with notice and hearing by the Supreme Court of Nebraska before a lawyer may be suspended or disbarred. This proceeding is separate and distinct from any procedures by the Committees of the State Bar Association.

This eliminates the petitioner's allegations as to his treatment before the Committee on Inquiry even if his contentions were sustained by the record. Nor are any of his contentions sustained by the record, but on the contrary the record shows that he was afforded "due process". The granting of a writ of certiorari in this matter should be refused.

Respectfully submitted,

STATE OF NEBRASKA, EX REL.
NEBRASKA STATE BAR
ASSOCIATION, RESPONDENT.

BY: CLARENCE A. H. MEYER,
Attorney General, State
of Nebraska,

GERALD S. VITAMVAS,
Deputy Attorney General,
State of Nebraska,
Its Attorneys.

APPENDIX 1

RULES OF THE SUPREME COURT

DISCIPLINARY PROCEEDINGS

1. **Nature of Proceedings; Purpose.** Proceedings for discipline of attorneys shall be considered civil in their nature, and for the purpose of protecting the public and the good name of the members of the bar of the State of Nebraska. They may be instituted against any person who has been licensed to practice in the courts of the State of Nebraska.

2. **Institution of Proceedings; How Entitled; Who may Bring; Leave of Court Required.** Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, or on the relation of any other person, if leave of court be first obtained. Leave may be granted to a private person to file proceedings as relator only upon a prima facie showing of probable grounds for disciplinary measures, and only after the matter has been submitted to the appropriate Committee of Inquiry, and reviewed by the Advisory Committee. Proceedings may also be instituted by order of the Supreme Court.

3. **Institution of Proceedings; Complaint; Docketing of Cause.** Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the Clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court.

4. **Service and Proof of Service; Manner; Registered Mail; Publication of Notice; Contents.** Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state, in which case it shall be proved by the official return of the officer making such service. Service shall be deemed to have been waived if the respondent shall sign a written receipt for a copy of the complaint and notice. Service may likewise be had by the mailing by the clerk of this court of a certified copy of said complaint and notice by registered mail to the respondent at his last known address; and in that event the official return card of the United States mail, signed by the respondent, acknowledging receipt of the envelope containing the copy of said complaint and notice, shall be deemed sufficient proof of service. In the event that it shall appear by affidavit that personal service cannot be had upon the respondent and that letters to the respondent's last known address are returned unclaimed, service may be had upon the respondent by publication of notice four successive weeks in some legal newspaper published in the county wherein the respondent last resided. Such notice shall state that complaint for disciplinary action has been filed in the Supreme Court of Nebraska against the respondent and shall give the date of filing and the time within which respondent is required to answer.

5. **Answer; Time of Filing; Extension.** The answer of the respondent shall be filed within 20 days after service of notice and a copy of the complaint, or within 20 days after service by publication, as hereinbefore provided, shall have been completed. For cause shown the court may extend the time to answer.

7. **Reference; Taking of Testimony; Report of Referee.** Upon the filing of an answer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. He shall have a competent shorthand reporter present who shall take in shorthand and transcribe in typewriting all oral evidence adduced at the hearing had before the referee. The referee may continue the hearing from time to time as circumstances may require, but shall not delay his proceedings unless justice and equity so require.

The referee shall make a written report stating his findings of fact and recommendations. The typewritten record of the proceedings shall have attached to it all of the exhibits offered at the hearing, and shall be certified by the referee; and the referee shall promptly transmit to this court his report, together with such record so certified.

Upon the filing of an answer raising an issue of law only, the court may in its discretion refer the matter to a member of the bar as referee for such service in relation thereto as the court may by its order of reference direct.

8. **Motion for Final Judgment; Exceptions to Report.** Within 10 days after the filing of such report, either

party may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require.

9. **Briefs; Time of Filing and Service; Hearing of Case.** If exceptions be filed to the findings or report of the referee, printed briefs and arguments shall be filed and oral arguments made in the Supreme Court as required by the rules of this court in civil cases. The party filing exceptions to the findings and report of the referee shall serve and file his brief within 30 days after the filing of such report and the brief of the adverse party shall be served and filed within 30 days thereafter. The case shall thereupon be placed upon the Call for hearing.

10. **Disposition of Case; Orders.** The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate.

11. **Motions for Rehearing; Time of Filing.** Either relator or respondent may file a printed motion for rehearing at any time within twenty days from the filing of the opinion or rendition of the judgment of the court.

APPENDIX 2

IN THE SUPREME COURT OF NEBRASKA

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION,	)	Gen. No. 34487
COMPLAINANT,	)	
V.	)	STIPULATION
JOHN P. JENSEN,	)	
RESPONDENT.	)	

IT IS STIPULATED by and between the parties hereto as follows:

I.

That any or all of the evidence contained in the transcript of evidence taken before the Committee on Inquiry on the 18th day of July, 1957 and the 6th day of August 1957 and transcribed and submitted by Court Reporter, Robert Knight and all testimony offered at the hearing before the Advisory Committee on the 23rd of May, 1958 and all depositions taken by either party since these proceedings were filed in the Supreme Court, may be offered by either party and shall be received in evidence the same as if said witness was present in court and testified, all subject to objections as to relevancy, competency or materiality.

II.

That the exhibits attached to the above evidence, including those forming a part of any deposition that

may be taken may be likewise offered in evidence subject to the same objections.

III.

It is the intention of the parties with reference to said exhibits to waive any foundation as far as proof of authenticity but subject to objections as to competency, materiality or relevancy.

IV.

Neither party shall be bound by any evidence as to its truth not offered by such party.

V.

It is further stipulated that either party may offer any further and additional evidence, supplemental to the evidence hereinbefore referred to in this stipulation, either by way of explanation, contradiction or otherwise or as proof or contradiction of any matter raised by the pleadings.

VI.

Notwithstanding the foregoing stipulation, both parties agree that any witness that is available, requested by the Referee, shall be called.

STATE, EX REL. NEBRASKA
STATE BAR ASSOCIATION.
COMPLAINANT,

BY s/ GERALD S. VITAMVAS,
Its Attorney.

JOHN P. JENSEN, RESPONDENT.

BY s/ CHARLES B. PAINE
s/ JOSEPH T. VOTAVA
s/ KENNETH H. DRYDEN